TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 68

T.I.M.E. INCORPORATED, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 26, 1958
CERTIORARI GRANTED OCTOBER 13, 1958

SUPREME COURT OF THE UNITED STATES

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INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., NOVEMBER 10, 1958

[fol. 6]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS LUBBOCK DIVISION

Civil Action No. 1757

T.I.M.E., INCORPORATED,

VS.

UNITED STATES OF AMERICA.

FIRST AMENDED ORIGINAL COMPLAINT—
Filed January 30, 1956

To the Honorable Court:

Now comes Complainant, T.I.M.E., Incorporated and with leave of the Court, files this its First Amended Original Complaint, and hereby brings this suit against the United States of America as Defendant suing for unpaid transportation charges on shipments of freight which were transported by the Complainant at the special instance and request of the Defendant, Complainant alleges:

I.

Complainant is a corporation organized under the laws of Delaware, but having its principal office and place of [fol. 7] business in Lubbock, Texas, which is within the territorial limits of the Lubbock Division of the United States District Court for the Northern District of Texas. Complainant corporation is a resulting merger of The Intercity Motor Express, Inc., a Texas Corporation, and the Southwestern Freight Lines, a California Corporation, under authority of the Interstate Commerce Commission in its Docket No. MC-F-5353. As a result of such merger,

this Complainant acquired all of the assets and assumed all of the liabilities of the two predecessor corporations, and for all purposes herein, "Complainant" shall be used to refer to this Complainant and its predecessors in interest.

II.

This Court has jurisdiction of this cause under authority of Title 28, Section 1346, USCA, in that this is a suit for a debt arising under an express contract, to-wit, the carriage of freight by Complainant for the United States Government and the amount involved is less than $10,000.00, to-wit, $379.51.

III.

That Complainant is a Common Carrier Motor Carrier operating under authority of the Interstate Commerce Commission under its Certificate No. MC 35320, and related subdivisions. That it operates generally between Memphis, Tennessee on the one hand and Los Angeles, California on the other hand, via Little Rock and Fort [fol. 8] Smith, Arkansas; Oklahoma City, Marian (Tinker Field), Oklahoma; Lubbock, Odessa, Pyote, and El Paso, Texas; Hobbs, New Mexico; and Tucson, Phoenix, Arizona; and Los Angeles, California. And Complainant, as such, has been operating for a period of over ten years.

At the special instance and request of the Defendant, this Complainant moved various and sundry freight shipments for the Defendant. The exact date, points of origin and commodities transported are shown in detail and specifically in government bills of lading executed by the Defendant and after the transportation service was performed and accomplished, said original government bills of lading were turned over to the Defendant. Such bills of lading are set forth in Exhibit A, attached hereto and made a part hereof, and of which the Defendant has full and complete knowledge.

That as a part of the contract of carriage, the Defendant agreed to pay the lawful tariff rates and charges as on file with the Interstate Commerce Commission on the respective dates of the movement of the shipments.

IV.

That as set forth in Exhibit A; in accordance with the bills of lading numbers as contained in said Exhibit, being a column designated as "GBL No. --", this Complainant has filed certain overcharge claims with the Defendant, upon these movements, to which the Defendant has as-[fol. 9] signed the numbers as shown in the second column under the heading "Government Claim". The amounts due this Complainant are set forth in the third column under the heading "Amount". The Defendant has recognized and paid a portion of said claims as set forth in said Exhibit under the column "Amount of Claim GAO has paid T.I.M.E.". Under the column designated as "GAO Owes T.I.M.E." there is listed the balance of the amounts the Defendant owes to this Complainant, which totals the sum of $14,414.82.

That the shipments set forth in Exhibit A moved from Tinker Air Force Base designated as Marian, Oklahoma to McClellan Air Force Base, Planehaven, California.

That the lawful rate and charges due upon said shipment are reflected in Item No. 32810, National Motor Freight Classification No. 9, MF-ICC-No. 17; and Item No. 405, Rocky Mountain Motor Transcontinental Class Tariff No. 5-A, MF-ICC-No. 31, which is the only and sole lawful rate on file with the Commission at the time of the movement of said shipments and represents the lawful and correct charge for such services. This Defendant, on the other hand, through its General Accounting Office, herein designated as GAO, contends that the lawful rate would be a rate based on a combination of rates over El Paso, Texas from point of origin to El Paso, Texas and from El Paso, Texas to destination and refuses to pay the legal and lawful rate and has declined and refused to pay the [fol. 10] claims as set forth in Exhibit A. And that by virtue thereof, the Defendant became indebted to this Complainant in the amount of $14,414.82.

V.

That by virtue of other freight movements the GAO deducted various amounts from freight charges otherwise

due this Complainant unlawfully and without authority in the amount of $2,242.58 and that by virtue thereof and the account set forth in Exhibit A, the Defendant became liable to this Complainant in the amount of $16,657.40, for which the Defendant is entitled to credit of $16,277.89, leaving a balance due Complainant in the amount of $379.51.

Wherefore, premises considered, Complainant prays the Court that it have judgment for its debt in the sum of $379.51, and that Complainant have judgment for its costs and for such other and further orders as may be just and equitable, for which the Complainant will ever pray.

Respectfully submitted,

Benson & Howard, 817 Lubbock National Building, Lubbock, Texas, Attorneys for Complainant, By:
[fol. 11] /s/ W. D. Benson Jr., Of Counsel.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S ANSWER, COUNTERCLAIM AND CROSS ACTION—
Filed January 30, 1956

Comes now United States of America, defendant in the above numbered and entitled cause, acting herein by and through its duly authorized United States Attorney for the Northern District of Texas, and in reply to plaintiff's first amended original complaint and by way of counterclaim against plaintiff would respectfully show the following:

First Defense

1.

Paragraph 1 of the complaint is admitted.

2.

The jurisdiction of the Court is admitted except insofar as a determination of the reasonableness of any rate may be required.

[fol. 12]

3.

Paragraph 3 of the complaint is admitted except for the allegations in the last paragraph thereof which is denied. It is admitted that defendant agreed to pay any charges legally due.

4.

(a) The first paragraph of Section 4 of the complaint is admitted except insofar as it alleges it owes plaintiff the sum of $14,414.82, which is denied.

(b) The second paragraph of Section 4 of the complaint is admitted.

(c) The third paragraph of Section 4 of the complaint is denied.

5.

Paragraph 5 of the complaint is denied.

Second Defense

Defendant alleges that the rate presently chargeable for the shipments set forth in Exhibit A is one based on a combination of rates to and from El Paso, Texas; that the lawful charges are those already paid to plaintiff by defendant; and that defendant owes plaintiff nothing for these transportation services.

[fol. 13]

Third Defense

Defendant further says that should the Court find that the rate asserted by plaintiff is applicable on the sum shown on plaintiff's Exhibit A, then such rate is *prima facie* unreasonable, and, therefore, unlawful, to the extent that it exceeds the aggregate of the intermediate rates to and from El Paso, Texas; that the Interstate Commerce Commission has jurisdiction to determine the reasonableness of interstate freight rates, and that this Honorable Court should defer judgment in this case for a reasonable period of time to permit defendant to file a complaint with the Interstate Commerce Commission and obtain a finding as to the reasonableness of such rate.

Defendant's Counterclaim Against T.I.M.E., Inc.

Comes now United States of America, acting herein by and through its duly authorized United States Attorney for the Northern District of Texas, and by way of cross action against T.I.M.E., Inc., plaintiff herein, would respectfully show the following:

1.

The Court has jurisdiction of this cross action because the claim asserted herein is one on behalf of the United States of America.

[fol. 14]

2.

That T.I.M.E., Inc. is indebted to the United States of America in the sum of $17,657.37 by virtue of said overpayments on shipments made by the government and transported by T.I.M.E., Inc. These shipments and overcharges are set out and described in defendant's Exhibit A which is attached hereto and made a part hereof. In the first column is shown the item number of the exhibit; the second column shows T.I.M.E.'s number of the overcharge; the third column shows the bill of lading and GAO file reference; the fourth column shows the amount of overpayment claimed to have been made by the government and the last column shows the amount T.I.M.E. agrees that it owes.

That the United States of America has paid to T.I.M.E. Inc. the figure set out in the fourth column captioned "Amount Claimed by the United States".

Wherefore, defendant prays that plaintiff take nothing by its suit and that it go hence with its costs without day and that it have judgment over and against plaintiff in the sum of $17,657.37, for costs of suit and for such other and further relief to which defendant may be entitled and in duty bound will ever pray.

United States of America, Heard L. Floore, United [fol. 15] States Attorney, /s/ John A. Lowther, Assistant United States Attorney.

Exhibit "A" to Defendant's Answer, etc.

Item No.	T.I.M.E. Overcharge No.	G A O File Reference	Amount Claimed by United States	T.I.M.E. Agrees It Owes Amount
1	OC-93-54	A56205 5/48 SEB	222.03	222.03
2	OC-96-54	AS1380 11/51 SEB	651.64	651.64
3	OC-97-54	A91174 10/51 SEB	71.38	71.38
4	OC-99-54	A972 7/51 SEB	252.91	252.91
5	OC-102-54	A195813 3/51 SEB	146.25	146.25
6	OC-105-54	A95641 11/50 SEB	69.51	69.51
7	OC-465-4	A199921 3/51 SEB	101.71	101.71
8	OC-467-4	A192984 3/51 SEB	25.97	25.97
9	OC-172-54	A283685 5/51 SEB	348.49	348.49
10	OC-174-54	A4416 7/51 SEB	101.49	101.49
11	OC-206-54	A76716 10/49 SEB	116.22	116.22
12	OC-253-4	A259701 3/51 SEB	377.26	377.26
13	OC-258-54	A179408 2/52 SEB	98.46	98.46
14	OC-269-54	A118473 12/51 SEB	116.12	116.12
15	OC-352-54	A66381 11/51 SEB	195.91	195.91
16	OC-394-54	A5718 7/49 PDE	33.79	33.79
17	OC-398-4	A251175 5/50 SEB	440.39	440.39
18	OC-399-4	A16489 3/50 SEB	776.51	776.51
19	OC-401-4	A317433 6/51 SEB	52.56	52.56
20	OC-402-4	A71436 10/50 SEB	63.60	63.60
21	OC-406-4	A191432 5/5 JEL	14.96	14.96
22	OC-409-4	A260307 5/51 SEB	344.51	344.51
23	OC-411-4	A61249 8/51 SEB	290.33	290.33
24	OC-412-4	A2361 9/51 SEB	64.47	64.47
25	OC-415-4	A82803 11/51 SEB	16.10	16.10
26	OC-417-4	RALL640 7/43 HALE	58.40	58.40
27	OC-418-4	A231248 4/50 SEB	778.97	778.97
28	OC-419-4	A210574 3/51 SEB	21.32	21.32
29	OC-422-4	A161422 1/51 SEB	306.84	306.84
30	OC-424-4	A181151 2/51 SEB	154.80	154.80
[fol. 16]				
31	OC-425-4	A122949 12/50 SEB	308.69	308.69
32	OC-434-4	18344 7/51 SEB	34.83	34.83
33	OC-435-4	A292493 5/51 SEB	19.14	19.14
34	OC-436-4	260313 5/51 SEB	142.40	142.40
35	OC-437-4	A260309 5/51 SEB	49.18	49.18
36	OC-438-4	A305964 6/51 SEB	283.11	283.11

Item No.	T.I.M.E. Overcharge No.	G A O File Reference	Amount Claimed by United States	T.I.M.E. Agrees It Owes Amount
37	OC-439-4	A140843 1/51 SEB	582.27	582.27
38	OC-474-4	A223657 3/51 SEB	101.88	18.27
39	OC-475-4	A296138 5/51 SEB	191.62	191.62
40	OC-479-5	A161423 1/51 SEB	257.74	257.74
41	OC-483-4	A119297 12/50 SEB	57.72	57.72
42	OC-484-4	A175270 2/51 SEB	376.59	376.59
43	OC-527-4	A214581 2/52 SEB	142.95	142.95
44	OC-543-4	A73865 10/50 SEB	328.66	328.66
45	OC-559-4	A198096 3/49 SEB	30.54	30.54
46	OC-560-4	A296643 1/49 SEB	22.56	22.56
47	OC-691-4	A243022 3/52 SEB	109.45	109.45
48	OC-705-4	A225280 3/52 SEB	332.29	332.29
49	OC-757-4	A82803 11/51 SEB	93.05	93.05
50	OC-760-4	A153001 1/52 SEB	172.99	172.99
51	OC-815-4	A229382 3/52 SEB	80.92	80.92
52	OC-1087-4	A58810 11/50 SEB	333.93	333.93
53	OC-1089-4	A304648 8/51 SEB	46.19	46.19
54	OC-1090-4	A8089 9/51 SEB	205.14	205.14
55	OC-1091-4	A294258 5/51 SEB	312.49	312.49
56	OC-1095-4	A79611 10/51 SEB	14.62	14.62
57	OC-1098-4	A118433 12/51 SEB	19.68	19.68
58	OC-1157-4	A70271 11/51 SEB	456.82	456.82
59	OC-1167-4	A230205 4/51 SEB	97.03	97.03
60	OC-1171-4	A79447 11/51 SEB	92.58	92.58
61	OC-1221-4	A236519 5/52 JEL	728.06	728.06
62	OC-1259-4	A247365 6/52 JEL	131.58	131.58
63	OC-1260-4	A333590 5/52 SEB	69.17	69.17
66	OC-1331-4	A278166 4/52 SEB	504.45	504.45
67	OC-1332-4	A152072 1/52 SEB	308.38	308.38
68	OC-1520-4	A57612 8/52 JLW	449.72	449.72
69	OC-1521-4	A305983 5/52 SEB	713.74	82.03
[fol. 17]				
70	OC-1524-4	A305981 5/52 SEB	146.46	146.46
71	OC-1525-4	A118470 12/51 SEB	35.60	35.60
72	OC-1531-4	A21277 7/52 JLW	69.96	69.96
73	OC-1534-4	A74453 9/52 JLW	299.88	299.88
74	OC-1574-4	A233784 3/52 SEB	20.75	20.75
75	OC-1575-4	A260039 4/52 SEB	169.73	169.73
76	OC-1623-4	A9868 7/52 JLW	102.64	102.64

Item No.	T.I.M.E. Overcharge No.	G A O File Reference	Amount Claimed by United States	T.I.M.E. Agrees It Owes Amount
77	OC-1624-4	A95946 9/52 JLW	23.20	23.20
78	OC-1537-4	A287271 4/52 SEB	59.83	59.83
79	OC-1566-4	A279920 4/52 SEB	110.09	110.09
80	OC-1567-4	A47907 6/52 JLW	22.37	22.37
81	OC-1565-4	A282424 4/52 SEB	618.10	618.10
82	OC-1564-4	A271740 4/52 SEB	506.48	506.48
83	OC-1522-4	A212010 2/52 SEB	957.22	957.22
		Totals	17,657.37	16,942.03

In United States District Court

Stipulation of Facts—January 30, 1956

Now comes plaintiff, T.I.M.E., Inc. by its attorney of record and now comes defendant, United States of America, by its attorney of record and submits the issues involved in this case to the Court upon stipulated facts as follows:

[fol. 18] 1.

T.I.M.E., Inc., at all times germane to the issues herein was a common carrier motor carrier operating generally between Oklahoma City, Oklahoma, and Los Angeles, California, via El Paso, Texas, under authority of the Interstate Commerce Commission under Certificate No. 35320.

2.

All freight moving, herein involved, moved by T.I.M.E., Inc. or through its connecting lines for such movement the defendant was due to pay the legal or lawful tariff charges.

3.

It is stipulated and agreed as to the items contained in complainant's Exhibit A that all were movements of Scientific Instruments NOI and that the determination of an illustrative shipment will determine the issues with

respect to the other shipments in Exhibit "A". It is agreed that a typical shipment is as follows:

That the shipment moved on government bill of lading WW 8173298. The origin of the shipment was Tinker Air Force Base, Marion, Oklahoma, destination McClellan Air Force Base, Planehaven, California. This shipment was moved by T.I.M.E. and its connecting line from Marion, Oklahoma (Tinker Air Force Base), via El Paso, Texas, [fol. 19] to Planehaven, California (McClellan Air Force Base). The weight of the shipment was 14,400 pounds.

That at the time of the movement of this freight there was on file with the Commission among others, the following provisions:

Rocky Mountain Motor Tariff Bureau Tariff No. 5-A, M.F.-I.C.C. No. 31. Therein a through rate was named from Marion, Oklahoma, to Planehaven, California in the amount of $10.74 per cwt., which is double first class.

There also appeared a rate in Southwestern Motor Freight Bureau Tariff No. 1-F, M.F.-I.C.C. No. 141 naming a rate from Marion, Oklahoma, to El Paso, Texas, at $2.56 per cwt.

There was also on file a rate that appeared in Interstate Freight Carriers Conference Tariff No. 1-C, M.F.-I.C.C. No. A-5 naming a rate of $4.35 per cwt. from El Paso, Texas, to Planehaven, California.

Rocky Mountain Motor Tariff No. 5-A reads as follows:

405. Application of Volume Rates on Articles Rated Higher Than First Class

"Volume rates named in this tariff will not apply on any article carrying an LTL rating of higher than first class in the current classification. On [fol. 20] all such articles rates based on the LTL ratings in the classification will be the only class rates applicable."

The official issue of the Interstate Commerce Commission, Tariff MF-3, Rule 4 (i) which reads:

"(i) When a carrier or carriers establish a local or joint rate for application over any route from point of origin to destination, such rate is the applicable rate of such carrier or carriers over the authorized route, notwithstanding that it may be higher than the aggregate of the intermediate rates over such route."

It is further stipulated that Southwestern Motor Freight Bureau tariffs do not name a rate between Marion, Oklahoma, on the one hand and between Planehaven, California, on the other hand. That the Interstate Freight Carriers Conference tariffs do not name a rate between Marion, Oklahoma, and Planehaven, California. That the Rocky Mountain Freight Bureau tariffs name a through rate between Marion, Oklahoma, and Planehaven, California, but does not name a rate between Planehaven, California and El Paso, Texas, or between Marion, Oklahoma, and El Paso, Texas.

T.I.M.E. contends that the rate appearing in Rocky Mountain Tariff Bureau, Tariff No. 5-A, naming a rate of $10.74 per cwt. applies (the through rate). The defendant on the other hand, contends that the combination [fol. 21] of local or intermediate rates from Marion, Oklahoma, to El Paso, Texas, and from El Paso, Texas, to Planehaven, California, applies.

If the Court should determine that the through rate as contended by T.I.M.E. applies, the computation of Exhibit "A" in the amount of $14,414.82 is correct. On the other hand, if the Court should determine that the combination of local rates apply, then the defendant is not indebted to T.I.M.E. in any amount on these items.

It is a further position of the defendant that if this Court, after hearing of this cause, should determine that the rate applicable on these shipments is the rate contended for by the plaintiff, then it is the contention of defendant that such rate is "prima facie" unreasonable and therefore, unlawful to the extent that it exceeds the aggregate of the intermediate rates to and from El Paso, Texas. The defendant contends, in this event, that the Court should defer judgment in this case for a reasonable

time to enable defendant to file a complaint with the Interstate Commerce Commission and obtain a finding as to the reasonableness or unreasonableness of the rate.

With reference to the latter position of the defendant, it is the contention of T.I.M.E. that there is only one legal lawful rate named in the tariffs, to wit, the rate named in the Rocky Mountain Motor Tariff Bureau No. 5-A. That the remedy of the defendant, if any, was at the time the [fol. 22] tariff rate was filed or the issue raised at a prior time by a complaint before the Commission. Complaining of the rate at this time the Court is without jurisdiction to determine, and the Court is without jurisdiction to defer or remand the decision of the reasonableness of the existing rate to the Commission at this time.

Defendant's Counterclaim

With regard to the items contained in defendant's counterclaim as more specifically described in Exhibit "B" attached hereto, there are only the following items in dispute.

1. Item No. 38 of Exhibit "B", which were billed in the original government bill of lading as:

> "Domes, Airplanes, Cellulose, Derivative, Plastic, and Metal Combined."

That there appears under Item 120, Rocky Mountain Motor Tariff Bureau No. 5-A, M.F.-I.C.C. No. 31 which reads:

> "Airplane parts, NOI, made of plastics, synthetic gums or resins, in boxes or crates."

There also appears the following:

Rule 15, National Motor Freight Classification No. 11, M.F.-I.C.C. No. 1 which reads:

> [fol. 23] "COMBINATION ARTICLES when not specifically classified, articles which have been combined or attached to each other will be charged at the rating for highest classed article of the combination, and ship-

ments subject to volume on truck load rating, the minimum weight in which the highest minimum weight providing for such highest rating, where the volume or truck load ratings, are the same, the minimum weight will be the highest for any article in the combination."

There also appears in National Motor Freight Classification No. 11, M.F.-I.C.C. No. 1, Item No. 2700 which reads:

"Aircraft parts, NOI, other than cloth and wood or metal combined in boxes or crates—."

It is the contention of T.I.M.E. that Item 120 combined with Rule 15 covers the rate to be charged.

The defendant, on the other hand, contends that Item 2700 fixes the rates to be charged. That Item 120 is described in the tariff as an exception to the current classification. Defendant contends that since the rating claimed applicable by the plaintiff is described in the tariff as an exception to the current classification that the article must be classified in that tariff, and that if that be so, then [fol. 24] Rule 15 is not applicable because the rule is predicated on the articles not being classified in the classification.

2. Item No. 69 of Exhibit "B", ailerons, described in the bill of lading as "8 boxes aircraft ailerons" weighing 15,380 pounds.

National Motor Freight Classification No. 11, M.F.-I.C.C. No. 1, Item 2940 reads:

"Wing panels or sections; in boxes or crates—."

National Motor Freight Classification No. 11, M.F.-I.C.C. No. 1, Item 2690 reads:

"Aircraft parts, NOI, cloth or wood and metal combined in boxes or crates."

Also Rocky Mountain Motor Tariff Bureau U. S. Government Quotation No. 43-A provides:

"Freight, all kinds except as provided in Note 1 below:

Note 1:—The rates named do not apply on the following articles:

Airplanes.

Airplane Parts, viz.: Airplanes with power taken apart; boats or pontoons; bomb bay doors; cowls; ele-
[fol. 25] vators; fuselage, with or without power installed; gliders, other than glider kits; gun turrets; nacelles; plastic domes; rubber fuel cells or tanks; rudders or stabilizers; seats, set-up; wing flaps, panels or sections; wings."

T.I.M.E. contends that an aileron is actually a wing panel or section.

On the other hand, the defendant contends that ailerons should be classed as Aircraft Parts, NOI, cloth or wood and metal combined, as they are not wing sections or panels.

Dated this the 30th day of January, 1956.

Benson and Howard, By: /s/ W. D. Benson, Jr., Attorneys for Plaintiff.

Heard L. Floore, United States Attorney, /s/ John A. Lowther, Assistant United States Attorney, Attorneys for Defendant.

[fol. 26] EXHIBIT "A" TO STIPULATION OF FACTS

1. Item No.	2. Government Bill of Lading No.	3. Original G.A.O. No.	4. G.A.O. No. Under Which Settled	5. Amount Claimed by T.I.M.E.	6. Amount of T.I.M.E. Claim Paid by Gov't.	7. Unpaid Balance of T.I.M.E. Claim	8. Government Certificate of Settlement (or Voucher)
1	WW-8173298	TK-313204	TK-313204	$ 773.28	C-$ 221.76	$ 551.52	507589 6/ 5/51
2	WW-8173291	TK-313205	TK-312349	903.77	S- 259.18	644.59	533239 1/10/52
3	WW-8173873	TK-313214	TK-313214	1122.76		1122.76	
4	AF-116488	TK-313213	TK-313213	159.41	C- 159.41		509697 7/12/51
5	WW-8687278	TK-314018	TK-314018	596.14	C- 153.59	442.55	507691 6/ 5/51
6	WW-8173806	TK-314129	TK-313209	1275.48	S- 348.55	926.93	602569 3/30/54
7	WW-8175568	TK-314019	TK-314019	2237.46	C- 641.66	1595.80	507692 6/ 6/51
8	WW-8174787	TK-314021	TK-312349	958.01	S- 274.73	683.28	248953 3/16/54
9	WW-8175189	TK-314020	TK-314020	1851.58	C- 444.97	1406.61	507693 6/ 1/51
10	WW-8687956	TK-313968	TK-313968	602.62	C- 210.83	391.79	521165 9/26/51
11	WW-8174421	TK-314022	TK-314022	672.65	C- 192.90	479.75	507694 6/ 5/51
12	WW-817532	TK-318639	TK-318639	635.38		635.38	
[fol. 27]							
13	WW-8173561	TK-313209	TK-313208	1923.54	C- 275.81		509696 7/10/51
					C- 961.77	685.96	Vou-264821 5/49-S.E.B.

1. Item No.	2. Government Bill of Lading No.	3. Original G.A.O. No.	4. G.A.O. No. Under Which Settled	5. Amount Claimed by T.I.M.E.	6. Amount of T.I.M.E. Claim Paid by Gov't.	7. Unpaid Balance of T.I.M.E. Claim	8. Government Certificate of Settlement (or Voucher)
14	WW-8173119	TK-313206	TK-313206	1007.95	C- 309.18	698.77	521044 9/21/51
15	WW-8173636	TK-313211	TK-313210	1042.85	C- 299.07	743.78	507690 6/ 4/51
16	WW-8173691	TK-313212	TK-313212	959.08		959.08	
17	WW-8173446	TK-313208	TK-313209	750.19	S- 215.14	535.05	602569 3/30/54
18	WW-8173585	TK-313210	TK-313210	889.27	C- 255.03	634.24	507690 6/ 4/51
19	WW-8173437	TK-313207	TK-312349	765.76	S- 219.61	546.15	785990 1/22/52
20	WW-8173671	TK-312349	TK-312349	1024.70	C- 293.87	730.83	507688 6/ 1/51
			TOTALS	$20151.88	$5737.06	$14414.82	

TOTAL UNPAID BALANCE OF T.I.M.E. CLAIM—$14,414.82

Explanation of Symbols
in Volume No. 6:

C—Paid in Cash
S—Allowed but used as set-off against overpayments on other shipments.

[fol. 28]

Exhibit "B" to Stipulation of Facts

Item No.	T.I.M.E. Overcharge No.	G A O File Reference			Amount Claimed by United States	T.I.M.E. Agrees It Owes Amount
1	OC-93-54	A56205	5/48	SEB	222.03	222.03
2	OC-96-54	AS1380	11/51	SEB	651.64	651.64
3	OC-97-54	A91174	10/51	SEB	71.38	71.38
4	OC-99-54	A972	7/51	SEB	252.91	252.91
5	OC-102-54	A195813	3/51	SEB	146.25	146.25
6	OC-105-54	A95641	11/50	SEB	69.51	69.51
7	OC-465-4	A199921	3/51	SEB	101.71	101.71
8	OC-467-4	A192984	3/51	SEB	25.97	25.97
9	OC-172-54	A283685	5/51	SEB	348.49	348.49
10	OC-174-54	A4416	7/51	SEB	101.49	101.49
11	OC-206-54	A76710	10/49	SEB	116.22	116.22
12	OC-253-4	A259701	3/51	SEB	377.26	377.26
13	OC-258-54	A179408	2/52	SEB	98.46	98.46
14	OC-269-54	A118473	12/51	SEB	116.12	116.12
15	OC-352-54	A66381	11/51	SEB	195.91	195.91
16	OC-394-54	A5718	7/49	PDB	33.79	33.79
17	OC-398-4	A251175	5/50	SEB	440.39	440.39
18	OC-399-4	A16489	3/50	SEB	776.51	776.51
19	OC-401-4	A317433	6/51	SEB	52.56	52.56
20	OC-402-4	A71456	10/50	SEB	63.60	63.60
21	OC-406-4	A191432	5/5	JEL	14.96	14.96
22	OC-409-4	A260307	5/51	SEB	344.51	344.51
23	OC-411-4	A61249	8/51	SEB	290.33	290.33
24	OC-412-4	A2361	9/51	SEB	64.47	64.47
25	OC-415-4	A82803	11/51	SEB	16.10	16.10
26	OC-417-4	RALL640	7/43	HALE	58.40	58.40
27	OC-418-4	A231248	4/50	SEB	778.97	778.97
28	OC-419-4	A210574	3/51	SEB	21.32	21.32
29	OC-422-4	A161422	1/51	SEB	306.84	306.84
30	OC-424-4	A181151	2/51	SEB	154.80	154.80
31	OC-425-4	A122949	12/50	SEB	308.69	308.69
32	OC-434-4	18344	7/51	SEB	34.83	34.83
33	OC-435-4	A292493	5/51	SEB	19.14	19.14
34	OC-436-4	260313	5/51	SEB	142.40	142.40

[fol. 29]

Item No.	T.I.M.E. Overcharge No.	G A O File Reference	Amount Claimed by United States	T.I.M.E. Agrees It Owes Amount
35	OC-437-4	A260309 5/51 SEB	49.18	49.18
36	OC-438-4	A305964 6/51 SEB	283.11	283.11
37	OC-439-4	A140843 1/51 SEB	582.27	582.27
38	OC-474-4	A223657 3/51 SEB	101.88	18.27
39	OC-475-4	A296138 5/51 SEB	191.62	191.62
40	OC-479-5	A161423 1/51 SEB	257.74	257.74
41	OC-483-4	A119297 12/50 SEB	57.72	57.72
42	OC-484-4	A175270 2/51 SEB	376.59	376.59
43	OC-527-4	A214581 2/52 SEB	142.95	142.95
44	OC-543-4	A73865 10/50 SEB	328.66	328.66
45	OC-559-4	A198096 3/49 SEB	30.54	30.54
46	OC-560-4	A296643 1/49 SEB	22.56	22.56
47	OC-691-4	A243022 3/52 SEB	109.45	109.45
48	OC-705-4	A225280 3/52 SEB	332.29	332.29
49	OC-757-4	A82803 11/51 SEB	93.05	93.05
50	OC-760-4	A153001 1/52 SEB	172.99	172.99
51	OC-815-4	A229382 3/52 SEB	80.92	80.92
52	OC-1087-4	A58810 11/50 SEB	333.93	333.93
53	OC-1089-4	A304648 8/51 SEB	46.16	46.16
54	OC-1098-4	A5089 9/51 SEB	205.14	205.14
55	OC-1091-4	A294258 5/51 SEB	312.49	312.49
56	OC-1095-4	A79611 10/51 SEB	14.62	14.62
57	OC-1098-4	A118433 12/51 SEB	19.68	19.68
58	OC-1157-4	A70271 11/51 SEB	456.82	456.82
59	OC-1167-4	A230205 4/51 SEB	97.03	97.03
60	OC-1171-4	A79447 11/51 SEB	92.58	92.58
61	OC-1221-4	A236519 5/52 JEL	728.06	728.06
62	OC-1259-4	A247365 6/52 JEL	131.58	131.58
63	OC-1260-4	A333590 5/52 SEB	69.17	69.17
66	OC-1331-4	A278166 4/52 SEB	504.45	504.45
67	OC-1332-4	A152072 1/52 SEB	308.38	308.38
68	OC-1520-4	A57612 3/52 JLW	449.72	449.72
69	OC-1521-4	A305983 5/52 SEB	713.74	82.03
70	OC-1524-4	A305981 5/52 SEB	146.46	146.46
71	OC-1525-4	A118470 12/51 SEB	35.60	35.60
72	OC-1531-4	A21277 7/52 JLW	69.96	69.96
73	OC-1534-4	A74453 9/52 JLW	299.88	299.88

[fol. 30]

Item No.	T.I.M.E. Overcharge No.	G A O File Reference	Amount Claimed by United States	T.I.M.E. Agrees It Owes Amount
74	OC-1574-4	A233784 3/52 SEB	20.75	20.75
75	OC-1575-4	A266039 4/52 SEB	169.73	169.73
76	OC-1623-4	A9868 7/52 JLW	102.64	102.64
77	OC-1624-4	A95946 9/52 JLW	23.20	23.20
78	OC-1537-4	A287271 4/52 SEB	59.83	59.83
79	OC-1566-4	A279920 4/52 SEB	110.09	110.09
80	OC-1567-4	A47907 6/52 JLW	22.37	22.37
81	OC-1565-4	A282424 4/52 SEB	618.10	618.10
82	OC-1564-4	A271740 4/52 SEB	506.48	506.48
83	OC-1522-4	A212010 2/52 SEB	957.22	957.22
		TOTALS	17,657.37	16,942.03

[fol. 31]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

TRIAL COURT'S OPINION IN LETTER TO ATTORNEYS—June 30, 1956

Amarillo, Texas
June 30, 1956

Joseph B. Dooley, U. S. District Judge.

Benson & Howard, Lubbock, Texas.

Honorable Heard L. Floore, United States Attorney, Fort Worth, Texas.

Filed: May 7, 1957.

Re: T. I. M. E. Inc. v. United States of America
No. 1757-Civil
Lubbock Division

Gentlemen:

My conclusions in the above cause are as follows:

The Applicable Rate

The through rate from Marion, Oklahoma, to Planehaven, California, published in the Rocky Mountain Motor

[fol. 32] Tariff Bureau, Tariff 5A, MF-ICC No. 31, is the proper charge for the shipments in question, not only in conformity with the Interstate Commerce Commission, Tariff MF3, Rule 4 (i), but also upon the authority of the only case coming to my notice, which seems directly in point, that is, T. & M. Transportation Co, v. S. W. Shattuck Chemical Company, 148 Fed. 2d 777. The suggestion of counsel that the aforesaid Tariff MF3, Rule 4 (i), is not applicable to the Government, in view of 31 U. S. C. 71, does not seem sound. There is no such explicit provision in the cited statute. The rule recognized in the decisions is that, in making contracts for the transportation of property by common carriers, the Government stands in the same attitude as any other shipper. Hughes Transportation, Inc. v. United States, 121 F. Supp. 212.

The Plastic Domes

The proper covering classification for this property is that describing "Airplane Parts, NOI, made of plastics, synthetic gums or resins, in boxes or crates", published in Rocky Mountain Motor Tariff Bureau, Tariff No. 5A, MF-ICC No. 31, Item 120, combined with Rule 15, which is a subject covered in the filed stipulations.

Aircraft Ailerons

The proper covering classification for this property is that describing "Wing panels or sections; in boxes or crates", published in National Motor Freight Classification [fol. 33] No. 11, Item 2940, which is a subject covered in the filed stipulations. The Encyclopedia Britannica says that an aileron "is a movable part of the wing of an aeroplane".

The brief of Government counsel has forecast that, presumably, said counsel will now request that judgment herein be held in abeyance while they file an action with the Interstate Commerce Commission to determine the reasonableness or unreasonableness of the through rate herein mentioned, and, ordinarily, in instances somewhat similar, that course has been approved. General American Tank Car Corp. v. Eldorado Terminal Co., 308 U. S. 422; U. S.

v. Kansas City Southern Ry. Co., 217 Fed. 2d 763. But, in this instance, plaintiff's counsel seems to contend that, in respect to motor carriers, the Interstate Commerce Commission has no authority to decide the reasonableness or unreasonableness of a rate retrospectively as a basis for a reparation ordered by the Commission, or in support of a suit to recover an alleged overcharge by judicial judgment. This seems doubtful to me, just on the face of it, but I have not gone into the question closely, and if Government counsel do move to hold this case at rest, pending action before the Commission, then I would want to know whether such an order would serve any useful purpose, and, consequently, a thorough brief should be presented on the question above mentioned.

Awaiting replies from respective counsel, I am

[fol. 34] Sincerely yours,

/s/ Jos. B. Dooley, United States District Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

[Title omitted]

DEFENDANT'S MOTION TO HOLD JUDGMENT IN ABEYANCE—Filed July 18, 1956

Comes now United States of America, defendant and cross plaintiff in the above numbered and entitled cause and respectfully moves the Court to hold in abeyance the [fol. 35] entry of judgment herein for the length of time hereinafter set out, and for the following reasons:

1.

This action was commenced by T.I.M.E., Inc., plaintiff, to recover from the United States of America, defendant, certain transportation charges on shipments originating at

Marion, Oklahoma, and transported by plaintiff through El Paso, Texas, to Planehaven, California. In its answer defendant alleged that the aggregate of intermediate rates to and from El Paso is the applicable rate to said shipments rather than the through rate contained in Rocky Mountain Tariff Bureau as applied by T.I.M.E., Inc. The Court has determined this question adversely to the government.

In addition to its contention as to the applicable rate, defendant alleged that such through rate is *prima facie* unreasonable and therefore unlawful to the extent that it exceeds the aggregate of the intermediate rates to and from El Paso. Since this Court does not have jurisdiction to determine the reasonableness or unreasonableness of the rate to be applied, the United States of America now desires to commence an action before the Interstate Commerce Commission for a determination of that question, which is within the exclusive jurisdiction of the Commission.

[fol. 36]

2.

The United States of America has not filed an action before the Commission for such determination because of its contention that the only rate applicable to the forms in question is the aggregate of the intermediates, and no action before the Commission could be commenced until this Court had determined the applicable rate.

3.

No hardship will fall on plaintiff by the Court's delay since even under the Court's adverse decision the government will be entitled to a money judgment.

Wherefore, the United States of America respectfully moves the Court to hold the entry of judgment in this case in abeyance for a period of sixty days from the granting of this motion, to afford her an opportunity to apply to the Interstate Commerce Commission for a determination of the reasonableness or unreasonableness of the rate which the Court deems applicable to the shipments involved herein and if such proceeding is commenced within such sixty day period then to continue to hold the judgment in

abeyance until the Commission has finally determined the reasonableness or unreasonableness of the applicable rate.

[fol. 37] Respectfully submitted,

Heard L. Floore, United States Attorney.

/s/ John A. Lowther, Assistant United States Attorney.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

COURT'S OPINION IN LETTER TO ATTORNEYS—December 29, 1956

December 29, 1956
Amarillo, Texas

Joseph B. Dooley, U. S. District Judge.

Benson & Howard, Lubbock, Texas.

Honorable Heard L. Floore, United States Attorney, Fort Worth, Texas.

Filed: Dec. 31, 1956.

[fol. 38] Re: T. I. M. E. v. The United States of America
No. 1757-Civil
Lubbock Division

Gentlemen:

The defendant's motion to hold the entry of judgment in abeyance pending proceedings before the Interstate Commerce Commission is overruled and such an order should be presented promptly.

This ruling results from the conclusion that Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U. S. 246, and McClellan v. Montana-Dakota Utilities Co., 104 F. Supp. 46, affirmed 204 F. 2d 166, certiorari denied 346 U. S. 826, are decisive against said motion.

Ordinarily the Interstate Commerce Commission, like the United States Maritime Commission (Shipping Act, U. S. Code, Title 46, §817 and §821), in connection with reparation authority, may review the reasonableness of rates charged in past shipments. This is true in respect to railroads, (Interstate Commerce Act, U. S. Code, Title 49, §13(1)), and with respect to water carriers, (Interstate Commerce Act, U. S. Code, Title 49, §§907(b) and 908(b)(c)(d)), but that jurisdiction is lacking in respect to motor carriers (Interstate Commerce Act, U. S. Code, Title 49 §316(e)). The Civil Aeronautics Board, as the administrative agency over the air carriers, like the Interstate Commerce Commission, in respect to motor carriers, has [fol. 39] no reparation authority nor jurisdiction to review rates as to past transportation, (Civil Aeronautics Act, U. S. Code, Title 49, §642(d)). The same limitation of authority is found in the Natural Gas Act, U. S. Code, Title 15, §717d(a), and in the Federal Power Act, U. S. Code, Title 16, §824e(a). The legislative policy for these differences may not be evident, but there can be no doubt that the distinction is clearly manifested.

The Montana-Dakota Utilities Co. v. Northwestern Publice Service Co. case arose under the Federal Power Act and it will be noticed that the crucial statutory article cited in that decision in the presently material part is virtually word for word the same as the parallel statutory article dealing with motor carriers. In other words, I am unable to see any substantial difference in principle between that case and the present suit. Moreover, the denial of the present motion is also supported in Slick Airways v. American Airlines, 107 F. Supp. 199, 212, where the court said "if the instant complaint merely sought to recover damages under the Civil Aeronautics Act on account of unfair competitive practices committed, or unreasonable rates charged, by defendants, I would agree that it would not state a cause of action in this court."

It is true that the action on the present motion is contrary to the decision in Bell Potato Chip Co. v. Aberdeen Truck Line, 43 M. C. C. 337, which was decided before the Montana-Dakota case, and, likewise, contrary to the decision in New York-New Brunswick Auto Express Co. Inc.

v. The United States, 126 F. Supp. 215, cited by govern-
[fol. 40] ment counsel, as well as the strongest case for the government, United States v. Garner, 134 F. Supp. 16, but the Montana-Dakota case was not mentioned in either of the two opinions and probably did not come to the notice of the court.

Sincerely yours,

/s/ Jos. B. Dooley, United States District Judge.

In the United States District Court for the Northern District of Texas
Lubbock Division

[Title omitted]

[fol. 41]

Final Judgment—Filed and Entered March 5, 1957

On this day came on to be considered the above styled cause; the Court having tried the case in June of 1956 and having considered the evidence, the stipulation and contentions of the respective parties, and the defendant having filed its motion to hold the entry of judgment in abeyance pending the instituting of proceedings before the Interstate Commerce Commission, and it appearing that such motion should be overruled, the Court finds:

That the through rate from Marion, Oklahoma, to Planehaven, California, published in Rocky Mountain Motor Tariff Bureau, Tariff 5a, M.F.-I.C.C. No. 31, is the only proper charge for the shipments in question, in conformity with the Interstate Commerce Commission Tariff Circular M.F. No. 3, Rule 4(1), and that Rule 4(1) is applicable to the government.

The Court further finds that the proper covering classification for a shipment of "Domes, Airplane, Cellulose, Derivative, Plastic and Metal Combined" is "Airplane parts, NOI, made of plastics, synthetic gums or resins, in boxes or crates", as published in Rocky Mountain Motor Tariff Bureau 5a, M.F.-I.C.C. No. 31, Item 120, combined with Rule 15.

The Court further finds that the proper covering classification on a shipment billed as "8 boxes aircraft ailerons" [fol. 42] is covered in the tariff described as "wing panels or sections; in boxes or crates", as published in National Motor Freight Classification No. 11, Item 2940.

The Court is of the opinion that the motion of the defendant to hold the entry of the judgment in abeyance pending proceedings to be instituted before the Interstate Commerce Commission should be overruled and that jurisdiction is lacking in the Interstate Commerce Commission in respect to Motor Carriers to review the reasonableness of rates charged on past shipments.

It is, therefore, Ordered, Adjudged and Decreed by the Court as follows:

(a) That the motion of the defendant to hold the entry of the judgment in abeyance pending proceedings to be instituted before the Interstate Commerce Commission is overruled.

(b) That the defendant, United States of America, owes plaintiff, T.I.M.E., Inc. the sum of $14,414.82, and that plaintiff, T.I.M.E., Inc. is indebted to the defendant, United States of America, in the sum of $16,942.03, and accordingly the defendant, United States of America, on its cross action against T.I.M.E., Inc. is awarded judgment against plaintiff, T.I.M.E., Inc. for the sum of $2527.21.

[fol. 43] (c) That each party hereto pay the costs incurred by it.

(d) That all other relief herein prayed for is hereby specifically denied.

Entered this the 5th day of March, 1957.

/s/ Jos. B. Dooley, United States District Judge.

Approved as to Form:

/s/ W. D. Benson, Jr., Attorney for Plaintiff.

/s/ A. W. Christian, Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed May 2, 1957

Notice is hereby given that United States of America, defendant above named, hereby appeals to the United States Court of Appeals for the Firth (sic) Circuit from the final judgment entered in this action on the 5th day of March, 1957.

Dated this the 2nd day of May, 1957.

[fol. 44] Heard L. Floore, United States Attorney, /s/ A. W. Christian, Assistant United States Attorney, 206 United States Court House, Fort Worth, Texas, Attorneys for Defendant-Appellant, United States of America.

IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS ON APPEAL—
Filed May 29, 1957

The points upon which the appellant United States of America, defendant in the trial court, intends to rely on this appeal are as follows:

1.

The district court erroneously failed to give effect to the consistent holdings of the Interstate Commerce Commission that through rates which exceed the aggregate of intermediate rates are prima facie unreasonable, and thus unlawful.

[fol. 45]

2.

In the alternative, the district court erred in denying the defendant's motion to hold the entry of judgment in abeyance to permit the Interstate Commerce Commission to determine the reasonableness of the through rate here involved.

3.

The district court erred in entering judgment on the basis of the applicability of the through rate.

Heard L. Floore, United States Attorney, /s/A. W. Christian, Assistant United States Attorney, Attorneys for Defendant-Appellant, United States of America.

(Certificate of service omitted in printing.)

[fol. 46] IN UNITED STATES DISTRICT COURT

DESIGNATION OF THE RECORD ON APPEAL—Filed May 29, 1957

United States of America, defendant in the above entitled and numbered cause in the trial court, and appellant on the appeal of such cause to the United States Court of Appeals for the Fifth Circuit, designates the following portions of the record, proceedings and evidence to be contained in the record on appeal:

1. Plaintiff's First Amended Original Complaint
2. Defendant's Answer, Counterclaim and Cross Action in Reply to Plaintiff's First Amended Original Complaint
3. Stipulations
4. Court's opinion in letter to attorneys dated June 30, 1956
5. Defendant's Motion to Hold Judgment in Abeyance

[fol. 47] 6. Court's opinion in letter to attorneys dated December 29, 1956

7. Final Judgment
8. Notice of Appeal
9. Statement of Points
10. This Designation.

Heard L. Floore, United States Attorney, /s/ A. W. Christian, Assistant United States Attorney, Attorneys for Defendant-Appellant, United States of America.

(Certificate of service omitted in printing.)

[fol. 48] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 49]

IN UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
November 18, 1957

(Omitted in printing.)

[fol. 50]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16738

UNITED STATES OF AMERICA, Appellant,

versus

T.I.M.E., INCORPORATED, Appellee.

Appeal from the United States District Court for the Northern District of Texas.

OPINION—January 30, 1958

Before Hutcheson, Chief Judge, and Rives and Jones, Circuit Judges.

Rives, Circuit Judge:

T.I.M.E., Incorporated, a motor carrier, sued the United States under the Tucker Act[1] for unpaid transportation

[1] 28 U.S.C.A. §1346 (a)(2).

charges on shipments of freight. The United States asserted counterclaims upon which the district court held that it was entitled to $16,942.03, and that holding is not [fol. 51] contested on appeal. This appeal involves solely the question of the correctness of the district court's determination that T.I.M.E. was entitled to a total of $14,414.82 on its claims.

The facts were stipulated. T.I.M.E. was a common carrier motor carrier operating generally between Oklahoma City, Oklahoma and Los Angeles, California via El Paso, Texas, under authority of the Interstate Commerce Commission. It transported some twenty shipments of scientific instruments under Government bills of lading. A typical shipment illustrates the issues with respect to all of the shipments: it originated at Tinker Air Force Base, Marion, Oklahoma, and was transported over the lines of T.I.M.E. and a connecting carrier to McClellan Air Force Base at Planehaven, California.

At the time, there were on file with the Interstate Commerce Commission the following tariffs to which T.I.M.E. was subject:

(1) Rocky Mountain Motor Tariff Bureau Tariff No. 5-A, M.F.-ICC No. 31, providing a double first-class through rate of $10.74 per cwt. on scientific instruments N.O.I. from Marion, Oklahoma to Planehaven, California.

(2) Southwestern Motor Freight Bureau Tariff No. 1-F, M.F.-ICC No. 141, providing a rate of $2.56 per cwt. on scientific instruments N.O.I. from Marion, Oklahoma to El Paso, Texas.

(3) Interstate Freight Carriers Conference Tariff No. 1-C, N.F.-ICC No. A-5, providing a rate of $4.35 per cwt. on scientific instruments N.O.I. from El Paso, [fol. 52] Texas to Planehaven, California.

The through rate, $10.74, was thus considerably in excess of the sum of the intermediate rates, $6.91. There was,

however, on file with the Commission the official issue of the Interstate Commerce Commission Tariff M.F.-3, Rule 4(i), which reads:

> "(i) When a carrier or carriers establish a local or joint rate for application over any route from point of origin to destination, such rate is the applicable rate of such carrier or carriers over the authorized route, notwithstanding that it may be higher than the aggregate of the intermediate rates over such route."

The Government had paid the intermediate rates. The district court held that T.I.M.E. was entitled on its claims to a total of $14,414.82, the difference between the through rate and the aggregate of the intermediate rates.[2] The Government made some contention at the trial that the combination of the intermediate rates is applicable, but that position is not urged on appeal. The Government's main defense, which it continues to urge in this Court, is that the through rate is prima facie unreasonable and unlawful to the extent that it exceeds the aggregate of the intermediate rates, and that the proceedings should be stayed to enable the Government to obtain a determination from the Interstate Commerce Commission as to the reasonableness or unreasonableness of the rate to be applied.

[fol. 53] Under Tariff M.F.-3, Rule 4(i), quoted *supra*, the fact that the through rate is higher than the aggregate of the intermediate rates does not prevent it from being the applicable rate of the carrier. The Commission has often ruled, however, that through rates are prima facie unjust and unreasonable to the extent that they exceed the combination of local rates from and to the same points.[3]

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[2] Because of the larger amount of the Government's counterclaims, $16,942.03, not now in issue, judgment was entered in favor of the United States in the amount of $2,527.21.

[3] See Kingan & Co. v. Olson Transportation Co., 32 M.C.C. 10; Stokely Foods, Inc. v. Foster Freight Line, Inc., 62 M.C.C. 179; United States v. Davidson Transfer & Storage Co., Inc., No. MC-C-1849, decided October 14, 1957.

Section 216(c) of the Interstate Commerce Act, 49 U.S.C.A. 316(c), provides that: "Common carriers of property by motor vehicles may establish reasonable through routes and joint rates, charges, and classifications" with other carriers. Section 216(d), 49 U.S.C.A. 316(d), provides that: all charges of motor carriers for services covered by the Act "shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful." Section 204(c), 49 U.S.C.A. 304(c), provides that: upon complaint or upon its own initiative the Commission may investigate whether any motor carrier has failed to comply with any provision of the chapter or with any requirement established pursuant thereto, and issue an appropriate order to compel compliance.

Sections 13, et seq. of the Act, 49 U.S.C.A. 13, et seq., dealing with railroads, gives the Commission authority to award reparations, subject to a two-year limitation period, Section 16(3), 49 U.S.C.A. 16(3); but part II of [fol. 54] the Act covering motor carriers contains no similar provision. Nevertheless, the Commission has consistently held that the general powers conferred upon it in the Sections already mentioned and in other sections furnish authority to determine the reasonableness of a past rate, the lawfulness of which is brought into issue in a judicial proceeding.

Holdings to that effect had been made in a long line of decisions by divisions of the Commission.[4] In *Bell Potato Chip Co.* v. *Aberdeen Truck Line,* 43 M.C.C. 337, the full Commission undertook a "thorough re-examination" of its authority to "make an administrative determination of the lawfulness of rates charged on past shipments," and concluded that the earlier decisions of its

[4] See W. A. Barrows Porcelain Enamel Co. v. Cushman M. Delivery, 11 M.C.C. 365, 367; Hausman Steel Co. v. Seaboard Freight Lines, Inc., 32 M.C.C. 31; Dixie Mercerizing Co. v. ET and WNC Motor Transp. Co., 21 M.C.C. 491, affirmed on reconsideration, 41 M.C.C. 355; Koppers Co. v. Langer Transport Corp., 12 M.C.C. 741; Hill-Clarke Machinery Co. v. Webber Cartage Lines, Inc., 26 M.C.C. 144; Patten Blinn Lbr. Co. v. Southern Arizona Freight Lines, 31 M.C.C. 716.

divisions were correct. The opinion in the *Bell Potato Chip Co.* case, *supra,* was reconsidered at length and approved by the Commission in the very recent case of *United States* v. *Davidson Transfer & Storage Co., Inc.,* No. M-C-1849, decided October 14, 1957.

This construction of the Act by the body charged with primary responsibility for its administration is, of course, entitled to great weight by the courts.[5] Following such [fol. 55] construction, the Court of Claims and another district court have looked to the Commission for aid in the disposition of suits involving past motor carrier rates alleged to be unreasonable.[6]

The district court in the present case thought that the case of *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U.S. 246, precluded it from holding the entry of judgment in abeyance pending proceedings before the Interstate Commerce Commission. That was a five-to-four decision in which the majority held that the complaint stated no federally cognizable cause of action to which the referred issue was subsidiary. After full discussion, that case was distinguished in the report of the Commission in *United States* v. *Davidson Transfer & Storage Co., Inc., supra,* with the conclusion that:

> "* * * However, we do not interpret the *Montana-Dakota* case as holding that where a cause of action to which the issue of reasonableness is subsidiary is maintainable in the court in which it is brought, reasonableness issue may not be determined by the proper administrative body."

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[5] See United States v. Bergh, 1956, 352 U.S. 40, 47; Adams v. United States, 1943, 319 U.S. 312, 314-315; United States v. Citizens Loan & Trust Co., 1942, 316 U.S. 209, 214; Inland Waterways Corp. v. Young, 1940, 309 U.S. 517; United States v. American Trucking Associations, Inc., 1940, 310 U.S. 534, 549; United States v. Madigan, 1937, 300 U.S. 500, 506; Norwegian Nitrogen Co. v. United States, 1933, 288 U.S. 294, 315; United States v. Jackson, 1930, 280 U.S. 183, 193; Edwards's Lessee v. Darby, 1827, 12 Wheat. (25 U.S.) 207, 210.

[6] New York & New Brunswick Auto Express Co. v. United States, Ct. of Cl. 1954, 126 F.Supp. 215; United States v. Garner, E.D.N.C. 1955, 134 F.Supp. 16.

In *United States* v. *Western Pacific R. Co.*, 1956, 352 U.S. 59, 72, it was argued that, because Section 16(3) of [fol. 56] the Act prevented the Commission from considering complaints for overcharges against railroad carriers not filed within two years from the time the cause of action accrued, that the Commission was barred absolutely from hearing questions as to the reasonableness of rates arising in suits brought after two years, whether such questions came to the Commission by way of referral or an original suit. The Supreme Court held:

> "* * * that the limitation of § 16 (3) does not bar a reference to the Interstate Commerce Commission of questions raised by way of defense and within the Commission's primary jurisdiction, as were these questions relating to the applicable tariff."

United States v. *Western Pacific R. Co., supra* at p. 74

The case of *United States* v. *Chesapeake & Ohio R. Co.*, 1956, 352 U.S. 77, 81, decided on the same day, is to the same effect. From those decisions, it would seem to follow that the Commission's lack of power to award reparations does not negative its authority to determine the reasonableness of a filed rate, when that issue is incident to a federally cognizable cause of action pending in court.

Congress undertook, in terms, to save existing common law and statutory rights and remedies. Section 216 of the Act, 49 U.S.C.A. 316, relating to the duty to establish reasonable rates, concludes with a provision that : "Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith." Very clearly, [fol. 57] the district court could not itself undertake an independent investigation into the reasonableness of the rate. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426. The court, then, had the alternative either of denying the shipper any remedy against a filed rate, which on its face was prima facie unreasonable and unlawful, or of holding its judgment in abeyance to permit a determination of the reasonableness of the rate by the Interstate Commerce Commission. In our opinion, the second alternative is more consistent with justice, with

the terms of the Interstate Commerce Act, and with the cases. The judgment of the district court is, therefore, reversed and the cause remanded with directions to grant the motion to hold the judgment in abeyance to enable the Government to obtain a determination from the Interstate Commerce Commission with respect to the reasonableness of the through rate as applied to the transportation services here involved.

Reversed and remanded with directions.

[fol. 58]

IN UNITED STATES COURT OF APPEALS

No. 16738

UNITED STATES OF AMERICA,

versus

T.I.M.E. INCORPORATED.

JUDGMENT—January 30, 1958

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to grant the motion to hold the judgment in abeyance to enable the Government to obtain a determination from the Interstate Commerce Commission with respect to the reasonableness of the through rate as applied to the transportation services here involved.

[fol. 59]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPELLEE'S PETITION FOR REHEARING—
Filed February 19, 1958

Comes now T.I.M.E. Incorporated, the Appellee, and files this, its Petition for Rehearing, and would show the court:

I.

This court erred in holding that the District Court should have held its judgment in abeyance in order that the Government may obtain determination of the reasonableness of an applicable rate from the Interstate Commerce Commission.

[fol. 60]

II.

This court erred in holding that the Interstate Commerce Commission, in spite of its admitted lack of reparations authority over motor carriers, has the power to decide the reasonableness of an applicable rate charged by such carriers on shipments handled in the past.

III.

This court erred in declining to follow *Montana-Dakota Utilities Company* v. *Northwestern Public Service Company*, 341 U.S. 246, (1951).

IV.

This court erred in applying the law announced in *United States* v. *Western Pacific Railroad Company*, 352 U.S. 329, (1956), because the facts in the present case do not give rise to the application of such law.

Wherefore, the Appellee prays that the court grant this Petition for Rehearing and set aside its judgment of January 30, 1958, and enter judgment affirming the decision of the trial court.

Respectfully submitted,

Benson & Howard, 1105 Great Plains Life Bldg., Lubbock, Texas, By /s/ W. D. Benson, Jr., Attorneys for Appellee.

[fol. 61] (Certificate of service omitted in printing.)

[fol. 62]

IN UNITED STATES COURT OF APPEALS

ORDER DENYING REHEARING—February 25, 1958

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 63] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 64]

SUPREME COURT OF THE UNITED STATES

No. 68, October Term, 1958

[Title omitted]

ORDER ALLOWING CERTIORARI—October 13, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is consolidated with No. 96 and a total of two hours allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

TRANSCRIPT OF RECORD

upreme Court of the United States

OCTOBER TERM, 1958

No. 96

DAVIDSON TRANSFER & STORAGE COMPANY, INC., PETITIONER,

vs.

UNITED STATES OF AMERICA.

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 11, 1958.
CERTIORARI GRANTED OCTOBER 14, 1958.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 96

DAVIDSON TRANSFER & STORAGE COMPANY, INC., PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., OCTOBER 31, 1958

[fol. 1]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14123

UNITED STATES OF AMERICA, Appellant,

v.

DAVIDSON TRANSFER & STORAGE COMPANY, INC., Appellee.

Appeal From the United States District Court for the District of Columbia

Joint Appendix—Filed October 16, 1957

[File endorsement omitted]

[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

RELEVANT DOCKET ENTRIES

1955

Feb. 15 Complaint filed.

July 1 Answer of deft. to complt. filed.

1957

May 27 Motion of plft. for summary judgment filed.

June 6 Cross-motion of deft. for summary judgment filed.

June 10 Order granting plaintiff's motion for summary judgment and denying deft's. cross-motion for summary judgment and that plft. recover from deft. the sum of $18.34 with interest and costs (N). McGarraghy, J.

Aug. 7 Notice of appeal by deft. filed.

[fol. 3]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 673-55

DAVIDSON TRANSFER & STORAGE CO., INC., Plaintiff,

v.

THE UNITED STATES OF AMERICA, Defendant.

COMPLAINT FOR BREACH OF CONTRACTS—
Filed February 15, 1955

1. The jurisdiction of this Court is founded on Section 1346 (a) (2) of Title 28 of the United States Code, giving the United States District Courts original jurisdiction of civil actions against the United States, not exceeding $10,000 in amount, founded upon any express or implied contract with the United States. The amount for which judgment is sought does not exceed $10,000.

2. Plaintiff, a Maryland Corporation, maintaining a place of business and doing business in the District of Columbia, is a common carrier by motor certificated by the Interstate Commerce Commission to operate, and operating, as a common carrier of freight in interstate commerce.

3. Plaintiff brings this suit, pursuant to Rule 23 (a) (3) of the Rules of Civil Procedure for the United States Courts, on behalf of itself and all of the other common carriers, some known and some unknown to Plaintiff, who are similarly situated and who subsequently become parties plaintiff to this suit. The common carriers similarly situated are so numerous and their individual causes of action are for such small amounts that it is impracticable to bring them all before the Court.

4. On or about May 29, 1952 Defendant, by a duly authorized agent, tendered to Plaintiff at Poughkeepsie, New York, for carriage to Bellbluff, Virginia, four shipments of

waterproofed cloth, covered by United States Government [fol. 4] Bills of Lading Nos. WV-9460830, WV-9460831, WV-9460832 and WV-9460833. Said shipments were transported by Plaintiff to Bellbluff, Virginia, where delivery was made to Defendant.

5. Defendant paid Plaintiff freight charges on the four shipments hereinabove described as follows: $304.38 on the shipment covered by United States Government Bill of Lading No. WV-9460830; $304.46 on the shipment covered by United States Government Bill of Lading No. WV-9460831; $304.18 on the shipment covered by United States Government Bill of Lading No. WV-9460832; and $279.82 on the shipment covered by United States Government Bill of Lading No. WV-9460833. Said charges were computed on the basis of the rates duly filed with and accepted by the Interstate Commerce Commission as the only legal, applicable rates for said transportation.

6. On or about September 30, 1954 Defendant, by its agent the General Accounting Office of the United States, demanded that Plaintiff refund to Defendant $4.78, $4.86, $4.58 and $4.12, respectively, on the four shipments described in Paragraph 5 of this Complaint. The ground of said demand was that the Interstate Commerce Commission had ordered, on July 20, 1953, in *Investigation and Suspension Docket No. M-3929, Surcharges, New York State,* reported in 62 Motor Carrier Cases 117, that Plaintiff Davidson and other common carriers cancel that portion of the legal, applicable rates for the transportation described in Paragraph 6 of this Complaint which had been legally made effective on May 8, 1952 and which were a surcharge on shipments moving in interstate commerce from, to, between or through points in the State of New York. In said demand Defendant stated that, unless the amounts demanded were paid within sixty days, deductions might be made from amounts otherwise due Plaintiff from Defendant pursuant to Section 322 of the Transportation Act of 1940, 54 Stat. 955, 49 U. S. C. A. 66.

7. On or about November 24, 1954 Plaintiff, to avoid having Defendant deduct the amount of its demand, as it

had threatened to do, and as Plaintiff and Defendant well knew it would do, from amounts otherwise due Plaintiff from Defendant, paid said demand under protest.

[fol. 5] 8. Defendant breached its contracts with Plaintiff for the transportation hereinabove described in that it exacted from Plaintiff the sums demanded by Defendant. Said sums are a portion of the total freight charges payable under the contracts for the transportation hereinabove described, computed on the basis of rates for said transportation filed with and approved by the Interstate Commerce Commission as the only legal rates applicable to said transportation.

9. The Interstate Commerce Commission is exclusively charged by law with the function of fixing just, reasonable and otherwise lawful rates for common carriers by motor. 49 U. S. C. A. 316. Common carriers by motor are required by law to file all of their rates for transportation in interstate commerce with the Interstate Commerce Commission, and are forbidden "to charge or demand or collect or receive a greater or less or different compensation for transportation * * * than the rates specified in the tariffs in effect at the time * * *." 49 U. S. C. A. 317 (b). The General Accounting Office of the United States has no authority to refuse to pay or to coerce refund of freight charges computed on the basis of any other rates than those filed with and approved by the Interstate Commerce Commission. Section 322 of the Transportation Act of 1940, 49 U. S. C. A. 66, giving it the right to deduct overpayments to common carriers from amounts subsequently found to be due such carriers, gives it only the right to deduct overpayments made on the basis of erroneously computed freight charges. It gives it no right to deduct payments of properly computed freight charges, based on applicable legal rates, whether or not the General Accounting Office deems those rates just and reasonable.

10. The Interstate Commerce Commission, in its opinion and order described above, upon the basis of which Defendant exacted refund from Plaintiff did no more than (1) find that the form of the tariffs under consideration, i.e.,

a surcharge, was an inappropriate one for the recoupment by common carriers of the cost of a truck mileage tax imposed by the State of New York, and (2) order its discontinuance. The Commission did not find that the collection of freight charges based on the surcharge for transportation rendered during the period the surcharge was in [fol. 6] effect was illegal. In other words, the Commission's opinion and order spoke prospectively only and not retroactively.

Wherefore, Plaintiff prays judgment against Defendant for freight charges in the amounts of $4.78, $4.86, $4.58, and $4.12, respectively, on the four shipments described in Paragraph 5 of this Complaint, a total of $18.34, with interest and costs, and for such other and further relief as the Court deems meet in the premises.

/s/ Bryce Rea, Jr., 1329 E Street, N. W., Washington 4, D. C., Counsel for Davidson Transfer & Storage Co., Inc.

Of counsel:

Edgar Watkins, 1329 E. Street, N. W., Washington 4, D. C.

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ANSWER—Filed July 1, 1955

FIRST DEFENSE

The complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

Answering the numbered paragraphs of the complaint, defendant avers:

1. Defendant is not required to answer the allegations contained in paragraph 1 of the complaint.

2. Admitted.

3. Defendant is without information with which to form a belief as to the truth or falsity of the allegations of paragraph 3 of the complaint.

4. Admitted.

5. Defendant admits that it paid plaintiff freight charges on the four shipments described in paragraph 4 in the amounts listed in paragraph 5. Defendant denies all other allegations in paragraph 5 of the complaint.

[fol. 7] 6. Admitted.

7. Admitted.

8. Denied.

9. Defendant admits the Interstate Commerce Commission is exclusively charged by law with the function of fixing just, reasonable, and otherwise lawful rates for common carriers by motor and that common carriers by motor are required by law to file all of their rates for transportation in interstate commerce with the Interstate Commerce Commission and are forbidden to charge or demand or collect or receive a greater or less or different compensation for transportation than the rates specified in the tariff in effect at the time. The remaining allegations in paragraph 9 are conclusions of law to which an answer is not required, but insofar as they may be deemed facts well pleaded, they are denied.

10. The allegations contained in paragraph 10 are conclusions of law to which an answer is not required but insofar as they may be deemed facts well pleaded, they are denied.

Wherefore, having fully answered defendant demands judgment herein in its favor, together with the costs of this action.

/s/ Leo A. Rover, United States Attorney;
/s/ Oliver Gasch, Assistant United States Attorney;
/s/ Frank H. Strickler, Assistant United States Attorney;
/s/ William F. Becker, Assistant United States Attorney.

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT—
Filed May 27, 1957

Comes now Plaintiff and, pursuant to Rule 56 (a) of the Rules of Civil Procedure and leave granted in the pre-trial [fol. 8] order of the Honorable Burnita Matthews, moves the Court for Summary Judgment on the grounds that the Complaint and Answer thereto and the stipulation agreed to by counsel at the pre-trial conference show that there is no genuine issue of any material fact and that Plaintiff is entitled to judgment as a matter of law. A memorandum of points and authorities in support of this motion is attached hereto.

/s/ Bryce Rea, Jr., /s/ Donald E. Cross, 1329 E Street, N. W., Washington 4, D. C.

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT—
Filed June 6, 1957

Comes now the defendant by its attorney, the United States Attorney, and respectfully moves this Court for summary judgment on the ground that there is no genuine issue of material fact and that defendant is entitled to judgment as a matter of law.

/s/ Oliver Gasch, United States Attorney;
/s/ Edward P. Troxell, Principal, Assistant United States Attorney;
/s/ E. Riley Casey, Assistant United States Attorney;
/s/ William R. Rafferty, Assistant United States Attorney.

[fol. 9]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT, ETC.—Filed June 10, 1957

This cause having come on and been heard on the Motion of Plaintiff for Summary Judgment and the Cross-Motion of Defendant for Summary Judgment and the Court having considered the pleadings, the pre-trial statement, the memoranda of points and authorities in support of said Motions, and the oral argument of counsel, and having concluded therefrom that there is no genuine issue as to any material fact, and that Plaintiff is entitled to judgment as a matter of law, it is this 10th day of June, 1957

Ordered That the Plaintiff's Motion for Summary Judgment be, and the same hereby is, granted, and that Defendant's Cross-Motion for Summary Judgment be, and the same hereby is, denied, and that the Plaintiff have and recover from Defendant the sum of $18.34, with interest at four (4) percent as provided in Section 2411 (b) of Title 28 of the United States Code and its costs of suit.

/s/ Joseph C. McGarraghy, Judge.

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

NOTICE OF APPEAL—Filed August 7, 1957

Notice is hereby given this 7th day of August, 1957 that The United States of America, the defendant, above named hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment and order of this Court entered on the 10th day of June, 1957 in favor of Davidson Transfer and Storage Company, Inc., the plaintiff above named against said defendant, the United States of America.

/s/ Oliver Gasch, United States Attorney, Attorney for Defendant.

[fol. 10] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14123

UNITED STATES OF AMERICA, Appellant,

v.

DAVIDSON TRANSFER & STORAGE COMPANY, INC., Appellee.

Appeal From the United States District Court for the District of Columbia

Mr. Alan S. Rosenthal, Attorney, Department of Justice, with whom Assistant Attorney General Doub, Mr. Oliver Gasch, United States Attorney, Mr. Paul A. Sweeney, Attorney, Department of Justice, and Mr. Melvin Richter, Attorney, Department of Justice, at the time the brief was filed, were on the brief, for appellant. Mr. Lewis Carroll, Assistant United States Attorney, also entered an appearance for appellant.

Mr. Bryce Rea, Jr., for appellee. Mr. Donald E. Cross also entered an appearance for appellee.

Before Prettyman, Bazelon and Bastian, Circuit Judges.

OPINION—Decided April 24, 1958

Prettyman, Circuit Judge: This is a civil action brought in the District Court against the United States under the [fol. 11] Tucker Act[1] on a contract. The plaintiff was Davidson Transfer & Storage Company, Inc., appellee here, a motor carrier. The contract was for the carriage of goods from Poughkeepsie, New York, to Bellbluff, Virginia. The

[1] 28 U.S.C. § 1346(a)(2).

District Court, on cross motions for summary judgment, rendered judgment for Davidson.

The State of New York had levied a ton-mile truck tax for the privilege of operating motor vehicles on its highways. Davidson filed with the Interstate Commerce Commission, as a tariff, a surcharge which purported to cover this tax. On the bills of lading here involved the Government paid the full tariff rate, including the surcharge. Later, upon a threat of offset pursuant to audit by the General Accounting Office, Davidson repaid to the Government the amount of the surcharge. Davidson then filed its suit to recover.

Davidson filed its tariff with the Interstate Commerce Commission on October 8, 1951. The Commission suspended the effective date for seven months, the maximum period allowed by the statute.[2] By the end of that period the Commission had not completed its inquiry, and the filed tariff went into effect on May 8, 1952. Thereafter, on July 20, 1953, the Commission issued its findings and order, concluding that the New York tax should be treated as a normal operating expense, to be reflected in the carriers' rates rather than in surcharges, and further concluded that the surcharges were unjust and unreasonable. The Commission ordered the surcharges cancelled, and they were cancelled on October 15, 1953. The transportation for which the amounts here in dispute were paid occurred during the period when the surcharges were in effect, that is, between May 8, 1952, and October 15, 1953.

[fol. 12] The contentions of the parties, summarized, are:

United States.

> While the Interstate Commerce Commission cannot award reparations in motor-carrier cases, it has the power and duty to determine the reasonableness of a past motor-carrier rate which is at issue in a judicial proceeding. The Commission has consistently so held in a line of cases culminating in *Bell Potato Chip Co.*

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[2] Sec. 216(g), Interstate Commerce Act, 49 STAT. 559 (1935), 52 STAT. 1240 (1938), 54 STAT. 924 (1940), 49 U.S.C.A. § 316(g).

v. *Aberdeen Truck Line*,[3] recently reaffirmed in another case involving our present appellee.[4] The reasoning in those cases is that the Commission has broad power to enforce compliance with the statute; that Congress has forbidden unjust and unreasonable rates; that to allow recovery of an unlawful charge would be inconsistent with the statutory preservation of shippers' common-law remedies; and that, unless the Commission's assistance were sought on the issue of the reasonableness of a rate in a judicial proceeding, the purpose of the primary jurisdiction rule would be totally frustrated. Other courts, notably the Court of Claims,[5] have looked to the Commission for aid in the disposition of suits involving the reasonableness *vel non* of past motor-carrier rates. The Supreme Court, in two recent cases,[6] has dispelled all doubt as to the Commission's jurisdiction to find a past motor-carrier rate unreasonable, and its lack of jurisdiction to award reparations does not affect the necessity of deferring to the Commission's view on questions raised in a judicial proceeding by way of defense and within the [fol. 13] Commission's primary jurisdiction. *Montana-Dakota*[7] is not to the contrary.

Davidson.

As long as the surcharge was in effect the United States was bound to pay it and the carrier was bound to collect it. The failure of the Commission to make its suspension order effective immediately shows the

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[3] 43 M.C.C. 337 (1944).

[4] United States v. Davidson Transfer & Storage Co., No. MCC-1849 (Oct. 14, 1957).

[5] New York & New Brunswick Auto Exp. Co. v. United States, 126 F.Supp 215 (1954).

[6] United States v. Western Pac. R.R., 352 U.S. 59, 1 L.Ed. 2d 126, 77 S.Ct. 161 (1956); United States v. Chesapeake & Ohio Ry., 352 U.S. 77, 1 L.Ed. 2d 140, 77 S.Ct. 172 (1956).

[7] Montana-Dakota Co. v. Pub. Serv. Co., 341 U.S. 246, 95 L.Ed. 912, 71 S.Ct. 692 (1951).

findings were directed solely to the future. The findings show the Commission was not concerned with unreasonableness but with correcting for the future an undesirable rate structure. When the Commission intends to make findings as a (sic) to past unreasonableness, it does so on specific terms. If reparations could not be had directly by suit, they cannot be had indirectly by withholding payment. The power of the General Accounting Office to offset payments to carriers does not give the United States greater rights than private shippers have. Nor does the fact that the carrier and not the shipper brought this suit make any difference. The question is whether the United States has a justiciable legal right to any rate other than the filed rate. It is immaterial whether the United States is plaintiff or defendant. The case is therefore distinguished from *Western Pacific.*[3] The District Court soundly reasoned that to permit the United States to refuse to pay the filed and effective surcharge would be to convert the power of the Commission to suspend for seven months into the power to suspend completely. If Congress had so intended it would have said so. It so provided in respect to rail carriers in Part I of the Interstate Commerce Act; its failure so to provide in respect to motor carriers was clearly deliberate. The rate-making power of the Commission over motor carriers is prospective only. One result of this restriction is that a shipper may be deprived of his right to reasonable rates for [fol. 14] a limited time while rates are under investigation. Another result is that a carrier may suffer a similar deprivation. Both results are examples of "regulatory lag", an inevitable consequence of the statutory scheme. Rate reasonableness is not a justiciable legal right but rather a criterion for administrative application. The only legal rate is the filed rate. The Supreme Court so held in *Montana-Dakota, supra.* The reason the buyer's complaint in that case failed to state a federally cognizable cause of action was that

[3] United States v. Western Pac. R.R., 352 U.S. 59, 1 L.Ed. 2d 126, 77 S.Ct. 161 (1956).

charging an unreasonable filed and effective rate did not constitute a violation of a justiciable legal right. It makes no difference whether the right is alleged by complaint for reparations or as defense to a suit for charges. In *Western Pacific, supra,* the Court merely held that the Court of Claims must refer the question of reasonableness to the Commission because of the facts in the case and the ambiguity of the tariff. The Interstate Commerce Act gives shippers a legal right to reparations in rail charges but does not do so in motor-carrier charges. In the motor-carrier cases upon which the United States relies, this issue was not raised. Whatever common-law right a shipper may have had to recover for unreasonable rates was superseded by Part II of the Interstate Commerce Act. Such a common-law right would be inconsistent with the statute.

The basic issue is whether, after the passage of the Interstate Commerce Act, a shipper by motor carrier has a right to a reasonable rate, cognizable in court as a defense to a claim for the amount of a filed and effective rate. We think the United States must prevail on this issue.

At common law a shipper had a right to a reasonable rate. The Interstate Commerce Act preserved that concept in respect to both railroads and motor carriers, declaring it to be the duty of every common carrier to establish just and reasonable rates[9] and declaring every unjust and un- [fol. 15] reasonable rate to be unlawful.[10] The statutory scheme of procedure and power in respect to rail carriers is in Part I of the Act,[11] principally in Sections 15 and 16;[12] and in respect to motor carriers it is in Part II,[13] principally

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[9] 41 STAT. 475 (1920), 49 U.S.C.A. § 1(5); 49 STAT. 558 (1935), 49 U.S.C.A. § 316(a) and (b).

[10] 41 STAT. 475 (1920), 49 U.S.C.A. § 1(5); 49 STAT. 558 (1935), as amended 54 STAT. 924 (1940), 49 U.S.C.A. § 316(d).

[11] 24 STAT. 379 (1887), as amended, 49 U.S.C.A. § 1 *et seq.*

[12] *Id.*, 49 U.S.C.A. §§ 15, 16.

[13] 49 STAT. 543 (1935), as amended, 49 U.S.C.A. § 301 *et seq.*

Section 216.[14] Both Part I and Part II provide that when a complainant alleges that a rate being charged is unreasonable the Commission shall determine the lawful rate to be thereafter observed. Part I, relating to rail carriers, proceeds further and provides that the Commission may award damages in such a case and direct the carrier to pay them.[15] Such an order is enforceable in a civil action by a federal district court. But Part II of the Act, relating to motor carriers, contains no provisions similar to these latter provisions of Part I. No authority is conferred on the Commission to award damages in respect to motor-carrier rates.

A similar situation exists in respect to proposed new rates. In both rail and motor-carrier cases the Commission may suspend a proposed new tariff for a limited time and determine the reasonable rate. If the tariff has gone into effect due to the expiration of the suspension, the Commission may, in the case of a rail carrier, order a refund to the shipper of the charged and collected excess over the reasonable rate.[16] But no provision as to refunds [fol. 16] appears in Part II of the Act, relating to motor carriers.

A filed rate determined by the Commission to be reasonable is not only the legal rate but also the lawful rate. This was thoroughly explained in the *Arizona Grocery* case.[17] While that case dealt with rail carriers its doctrines seem clearly applicable to motor carriers. The Court held that the Commission cannot disavow its legislative rate-making action and award reparations upon a different finding of reasonableness. If, on the other hand, the rate is carrier-made, not determined by the Commission to be reasonable, a shipper may complain and the statutory provisions we have described take effect.

The surcharge now before us, imposed by a motor carrier, had been filed and was effective but was not a Commission-

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[14] *Id.*, 49 U.S.C.A. § 316.

[15] 34 STAT. 590 (1906), as amended, 49 U.S.C.A. § 16(1).

[16] 36 STAT. 552 (1910), as amended, 49 U.S.C.A. § 15(7).

[17] Arizona Grocery v. Atchison, Topeka & Santa Fe Ry., 284 U.S. 370, 76 L.Ed. 348, 52 S.Ct. 183 (1932).

approved rate. We think a shipper by motor carrier was not deprived of his right to a reasonable rate because of the failure of Congress to give the Commission the adjudicatory function, a quasi-judicial power, of awarding reparations. He was merely left to his old remedy, *i.e.*, a civil action in court.

Absent a statute creating a special forum, a shipper's common-law rights were enforceable in court upon a complaint seeking reparations for unreasonable charges collected by a carrier.[18] The motor-carrier Part of the Inter-[fol. 17] state Commerce Act specifically provides that all remedies not inconsistent with its provisions regarding rates survive its passage.[19] Failure to provide in a new statute a new remedy is not inconsistent with the retention of an existing common-law remedy. Since the Act did not extinguish the right to reasonable rates for past services but merely failed to provide an administrative forum for adjudication of the damages, the right itself survived and the old remedy survived.

The remainder of the answer to the pending controversy falls rapidly into place. Davidson had a right to sue for its filed charges; the United States, a shipper, had a right to defend upon the ground that the claimed rate was unreasonable. At that point the doctrine of primary jurisdic-

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[18] Arizona Grocery v. Atchison, Topeka & Santa Fe Ry., *supra;* Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 436, 51 L.Ed. 553, 27 S.Ct. 350 (1907); Lewis-Simas-Jones Co. v. Southern Pac. Co., 283 U.S. 654, 660, 75 L.Ed. 1333, 51 S.Ct. 592 (1931); Interstate Commerce Comm'n v. Cincinnati, New Orleans & T. P. Ry., 167 U.S. 479, 505-506, 42 L.Ed. 243, 17 S.Ct. 896 (1897); Interstate Commerce Comm'n v. Baltimore & Ohio R.R., 145 U.S. 263, 36 L.Ed. 699, 12 S.Ct. 844 (1892); Dow v. Beidelman, 125 U.S. 680, 687, 31 L.Ed. 841, 8 S.Ct. 1028 (1888); Western Union Tel. Co. v. Call Pub. Co., 181 U.S. 92, 102, 45 L.Ed. 765, 21 S.Ct. 561 (1901); Mitchell Coal Co. v. Pennsylvania R.R., 230 U.S. 247, 264, 57 L.Ed. 1472, 33 S.Ct. 916 (1912); Tift v. Southern Ry., 138 Fed. 753, 759 (C.C.W.D.Ga. 1905), *aff'd*, 206 U.S. 428, 51 L.Ed. 1124, 27 S.Ct. 709 (1907); Smith v. Chicago & N.W. Ry., 49 Wis. 443, 5 N.W. 240 (1880); West Virginia Transportation Co. v. Sweetzer, 25 W.Va. 434, 444 *et seq.* (1885); BEALE & WYMAN, RAILROAD RATE REGULATION 12-15 (1906); II SHARFMAN, INTERSTATE COMMERCE COMMISSION 393-406 (1931).

[19] 49 STAT. 560 (1935), 49 U.S.C.A. § 316(j).

tion comes into play, and the *Western Pacific* case, *supra*, requires that the court refer the issue of reasonableness to the Commission. We need not here analyze that case.

We think the Commission's findings in respect to the proposed tariff were not sufficiently clear to serve as the basis for judicial judgment upon the complaint. It is not clear whether the Commission meant to find the surcharge an unreasonable rate during the then-past period when it was in effect.

We find ourselves in accord with the opinion of the Fifth Circuit in *United States* v. *T.I.M.E. Incorporated*.[20] [fol. 18] *Montana-Dakota, supra*, is not to the contrary. That was a lawsuit between two private utility companies, one claiming that the other had charged it unreasonable rates for electric energy. The plaintiff sued for the excess above a reasonable rate. The problem was whether it stated a federally cognizable cause of action. There was no diversity of citizenship, so a federal court could not entertain the suit absent some special federal statute. The plaintiff presented an ingenious theory. It said that a fraud, due to an interlocking directorate of supplier and suppliee, prevented it from appealing to the Federal Power Commission to fix a reasonable rate, and that therefore its suit was one to enforce the Power Act, which Act entitled it to reasonable rates. But the Supreme Court pointed out that alleged fraud adds nothing to federal jurisdiction. The plaintiff urged that the Commission had no power to grant reparations; but again it was clear that this lack created no federally cognizable cause of action. The difficulty was not lack of a cause of action but lack of a cause cognizable in a federal court.

Sentences from the opinion are urged upon us by Davidson to support its position, but we think the Court was discussing the case before it and not broad general principles inapplicable to its pending problem. That it was thus minded is apparent enough if its discussion is read carefully and in full context. In the case before us on this appeal there is a federally cognizable cause of action, an alleged breach of contract by the United States, and so this controversy falls outside the *Montana-Dakota* ruling.

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[20] 252 F.2d 178 (1958).

The cause will be remanded to the District Court with instructions to refer to the Interstate Commerce Commission the question of the reasonableness of the filed tariff surcharge as a rate during the period when it was filed and effective. Upon receipt of that finding the District Court [fol. 19] will proceed to the adjudication of the action before it.

Reversed and remanded.

Bazelon, Circuit Judge, heard oral argument but did not participate in consideration or decision of this case.

[fol. 20] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,123—April Term, 1958.

C. A. 673-55

UNITED STATES OF AMERICA, Appellant,

v.

DAVIDSON TRANSFER & STORAGE COMPANY, INC., Appellee.

Appeal From the United States District Court for the District of Columbia

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Before: Prettyman, Bazelon and Bastian, Circuit Judges.

JUDGMENT—April 24, 1958

This Cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On Consideration Whereof, It is ordered and adjudged by this Court that the order of the said District Court

appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court with instructions to refer to the Interstate Commerce Commission the question of the reasonableness of the filed tariff surcharge as a rate during the period when it was filed and effective.

Dated: April 24, 1958.

Per Circuit Judge Prettyman.

Circuit Judge Bazelon heard oral argument but did not participate in consideration or decision of this case.

[fol. 23] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 24]

SUPREME COURT OF THE UNITED STATES

No. 96, October Term, 1958

DAVIDSON TRANSFER & STORAGE COMPANY, INC.,
Petitioner,

vs.

UNITED STATES OF AMERICA.

ORDER ALLOWING CERTIORARI—October 13, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with No. 68 and a total of two hours allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.
